APPEAL NO. 051405
FILED AUGUST 9, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on May 23, 2005. The hearing officer resolved the disputed issue by deciding that the first certification of maximum medical improvement (MMI) and assigned impairment rating (IR) from (Dr. N) on October 18, 2004, did become final under Section 408.123. The appellant (claimant) appealed, disputing the determination that the October 18, 2004, certification from Dr. N became final. The claimant attached to his appeal a Request for Benefit Review Conference (TWCC-45) which indicates a dispute of Dr. N's certification of MMI and IR was disputed on December 17, 2004, within 90 days of the claimant's receipt. The TWCC-45 attached to the claimant's appeal was not offered or admitted into evidence at the CCH. The claimant additionally argues in his appeal that there was compelling medical evidence to show a misdiagnosis or undiagnosed medical condition and evidence of inadequate treatment. The respondent (carrier) responded, arguing that the TWCC-45 attached to the claimant's appeal should not be considered for the first time on appeal because it does not meet the standard for newly discovered evidence. The carrier additionally contends that the hearing officer considered all of the medical evidence and there was no compelling medical evidence to show a misdiagnosis or undiagnosed medical condition. The carrier urges affirmance of the disputed determination.

DECISION

Reversed and rendered as reformed.

The claimant attached to his appeal a copy of the TWCC-45 disputing Dr. N's October 18, 2004, certification, which is filed stamped as received by the Texas Workers' Compensation Commission (Commission) on December 17, 2004. Dr. N was the Commission-selected designated doctor. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. *See* generally, Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W. 2d 809 (Tex. App.-Dallas 1988, no writ). In determining whether new evidence submitted with an appeal requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. *See* Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993. Upon our review, we cannot agree that the evidence meets the requirements of newly discovered evidence, while its inclusion in the record would result in a different decision the claimant did not show that the new evidence submitted for the first time on appeal could not have been obtained prior to the hearing. The evidence, therefore, does not meet the standard for newly discovered evidence and will not be considered.

The parties stipulated in part that on _____, the claimant sustained a compensable injury; that Dr. N certified that the claimant reached MMI on October 18, 2004, with a 0% IR; and that the claimant received notice of the October 18, 2004, certification by verifiable means on December 2, 200[4]. We note that stipulation 1 E. contains a typographical error as to the date notice was received. We reform the stipulation to conform to the agreement of the parties reflecting the date notice was received as December 2, 2004, rather than December 2, 2002. The sole issue before the hearing officer was whether the October 18, 2004, certification by Dr. N became final pursuant to Section 408.123.

Section 408.123(d) provides that except as provided in subsections (e), (f), and (g), the first valid certification of MMI and the first valid assignment of IR to an employee are final if the certification of MMI and/or the assigned IR is not disputed within 90 days after written notification of the MMI and/or assignment of IR is provided to the claimant and the carrier by verifiable means. Section 408.123(e) provides in pertinent part that the first certification of MMI and/or IR may be disputed after the 90-day period if: (1) there is compelling medical evidence establishing the following: (B) a clear misdiagnosis or a previously undiagnosed condition; or (C) prior improper or inadequate treatment of the injury which would render the certification of MMI or IR invalid. Although the parties stipulated that the claimant received notice of the October 18, 2004, certification by verifiable means on December 2, 2004, there was no agreement on the record of when the claimant disputed the October 18, 2004, certification. The dispute at the CCH was centered around whether or not there was evidence to show that the claimant received inadequate treatment and/or a misdiagnosis or undiagnosed medical condition. The claimant contended that there was prior inadequate treatment because surgery had been recommended for the claimant's right elbow prior to the certification, surgery was performed after the certification, and the claimant benefited from the surgery. The claimant additionally argued that Dr. N did not take the claimant's elbow into consideration in making his certification showing a clear misdiagnosis. The carrier contended that Dr. N was aware of the surgical recommendation and that it is clear from Dr. N's reports that he considered the condition of the claimant's elbow in certifying MMI and assessing IR. In her discussion of the evidence, the hearing officer noted that the compelling evidence does not support that the claimant was misdiagnosed and the medical reports reflected that the claimant did not receive inappropriate or inadequate treatment. In light of her discussion of the evidence it is clear that the hearing officer made a typographical error in Finding of Fact No. 10 by mistakenly omitting the word "not." We reform Finding of Fact No. 10 to read as follows: Compelling medical evidence does not exist to show misdiagnosis of an undiagnosed medical condition by (Dr. S), (Dr. J), or (Dr. G). There is sufficient evidence in the record to support the hearing officer's findings that compelling medical evidence does not exist to show inadequate treatment, misdiagnosis, or an undiagnosed medical condition by Dr. S, Dr. J, or Dr. G.

The hearing officer found and it is undisputed that 90 days from the day after the December 2, 2004, notification of MMI certification was March 2, 2005. The hearing officer additionally found that based upon Commission Dispute Resolution Information

System (DRIS) notes, the claimant disputed the October 18, 2004, certification on March 4, 2005. There is a DRIS entry that reflects that a TWCC-45 was received by the Commission on March 4, 2005, from the claimant's attorney disputing the MMI date of October 18, 2004, and the 0% IR certified by Dr. N. However, there is also a DRIS entry dated December 29, 2004, which states "[Sic] reviewed TWCC-45 rec'd on 12/17/04 from atty [sic] [claimant's previous attorney]. Issue: Atty/clmt dispute the MMI date of 10/18/04 & 0% IR certified by [Dr. N]. Reviewed claim info. atty/clmt disputed within the 90 day timeframe." The hearing officer based her finding of when the claimant disputed Dr. N's October 18, 2004, certification upon an examination of the DRIS notes. A complete examination of the DRIS notes reflects that the claimant first disputed Dr. N's October 18, 2004, certification on December 17, 2003, within 90 days of his receipt of the certification by verifiable means. Therefore, the hearing officer's determination that the certification became final under Section 408.123 is an error.

The hearing officer based her finding of when the claimant disputed Dr. N's October 18, 2004, certification, upon her review of the DRIS notes. The DRIS notes reflect that Dr. N's certification was first disputed on December 17, 2004. Therefore we reverse the determination that the first certification of MMI and assigned IR from Dr. N on October 18, 2004, did become final under Section 408.123 and render a new determination that the first certification of MMI and assigned IR from Dr. N on October 18, 2004, did not become final under Section 408.123.

The true corporate name of the insurance carrier is **AMERICAN GUARANTEE & LIABILITY, INSURANCE COMPANY** and the name and address of its registered agent for service of process is

LEO MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge